No. 17-155

In The
Supreme Court of the United States

ERIK LINDSEY HUGHES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF AMICUS CURIAE OF CHANTELL AND MICHAEL SACKETT AND DUARTE NURSERY, INC., IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

This Court explained in *Marks v. United States*, 430 U.S. 188, 193 (1977), that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" In *Freeman v. United States*, 564 U.S. 522 (2011), the Court issued a fractured 4-1-4 decision concluding that a defendant who enters into a plea agreement under Fed. R. Crim. P. 11(c)(1)(C) may be eligible for a reduction in his sentence if the Sentencing Commission subsequently issues a retroactive amendment to the Sentencing Guidelines. But the four-Justice plurality and Justice Sotomayor's concurrence shared no common rationale and the courts of appeals have divided over how to apply *Freeman*'s result. The questions presented are:

1. Whether this Court's decision in *Marks* means that the concurring opinion in a 4-1-4 decision represents the holding of the Court where neither the plurality's reasoning nor the concurrence's reasoning is a logical subset of the other.

2. Whether, under *Marks*, the lower courts are bound by the four-Justice plurality opinion in *Freeman*, or, instead, by Justice Sotomayor's separate concurring opinion with which all eight other Justices disagreed.

3. Whether, as the four-Justice plurality in *Freeman* concluded, a defendant who enters into a Fed. R. Crim. P. 11(c)(1)(C) plea agreement is generally eligible for a sentence

reduction if there is a later, retroactive amendment to the relevant Sentencing Guidelines range.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. THE CIRCUIT COURTS HAVE MISSED THE MARK WITH *MARKS* 6

II. *RAPANOS* ILLUSTRATES HOW WIDE OF *MARKS* THE CIRCUIT COURTS ARE 13

III. JUDICIAL POLICY ON PLURALITIES: WORKING TOWARD MAJORITIES 32

IV. THIS COURT'S CLARIFICATION OF *MARKS* WOULD GET THE CIRCUIT COURTS BACK ON TARGET 37

CONCLUSION 40

TABLE OF AUTHORITIES

Page

Cases

A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen. of Mass., 383 U.S. 413 (1966) 7, 10, 22

AFTG-TG, LLC v. Nuvoton Tech. Corp., 689 F.3d 1358 (Fed. Cir. 2012) 34

Ainsworth v. Moffett Eng'g, Ltd., 716 F.3d 174 (5th Cir. 2013) 34

Baldasar v. Illinois, 446 U.S. 222 (1980) 35

Baze v. Rees, 553 U.S. 35 (2008) 33

City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750 (1988) 12

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) 33

Crawford v. Marion Cty. Election Bd., 553 U.S. 181 (2008) 33

Freeman v. United States, 564 U.S. 522 (2011) 3, 34

Furman v. Georgia, 408 U.S. 238 (1972) 6, 22

Garland v. Roy, 615 F.3d 391 (5th Cir. 2010) 5

Gibson v. American Cyanamid. Co., 760 F.3d 600 (7th Cir. 2014) 18-19

Green v. Haskell Cty. Bd. of Comm'rs, 568 F.3d 784 (10th Cir. 2009) 8

Gregg v. Georgia, 428 U.S. 153 (1976) 6, 12, 33

Grutter v. Bollinger, 539 U.S. 306 (2003) 35

Hawkes Co. v. U.S. Army Corps of Eng'rs,
963 F. Supp. 2d 868 (D. Minn. 2013) 36

In re Medtronic, Inc. Sprint Fidelis Leads Prods. Liab. Litig., 592 F. Supp. 2d 1147
(D. Minn. 2009) 34

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779 F. Supp. 2d 642 (E.D. Mich. 2011) 34

In re Sealed Case, 722 F.3d 361
(D.C. Cir. 2013) 33

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564 U.S. 873 (2011) 34

Johnson v. Bd. of Regents of Univ. of Ga.,
263 F.3d 1234 (11th Cir. 2001) 21

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(6th Cir. 2000) 34

King v. Palmer, 950 F.2d 771
(D.C. Cir. 1991) ..... *passim*

Lisk v. Lumber One Wood Preserving, LLC,
792 F.3d 1331 (11th Cir. 2015) 4, 8

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430 U.S. 188 (1977) ..... *passim*

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561 U.S. 742 (2010) 33

McKinney v. Bayer Corp., 744 F. Supp. 2d 733
(N.D. Ohio 2010) 34

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N. Cal. River Watch v. Wilcox, 633 F.3d 766
(9th Cir. 2010) 17

Nat'l Fed'n of Indep. Bus. v. Sebelius,
132 S. Ct. 2566 (2012) 33

National Association of Manufacturers v. Department of Defense, No. 16-299 (Jan. 22, 2018) 14

Nichols v. United States,
511 U.S. 738 (1994) 7, 35

Northern California River Watch v. City of Healdsburg, 496 F.3d 993 (9th Cir. 2007) 17

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Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 483 U.S. 711 (1987) 24

Planned Parenthood of Se. Pa. v. Casey,
505 U.S. 833 (1992) 33

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947 F.2d 682 (3d Cir. 1991) 23

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547 U.S. 715 (2006) ..... *passim*

Regents of the Univ. of Cal. v. Bakke,
438 U.S. 265 (1978) 4-5, 35

Rowland v. Washtenaw Cty. Rd. Comm'n,
731 N.W.2d 41 (Mich. 2007) 8

Sackett v. EPA, 566 U.S. 120 (2012) 1

Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.,
559 U.S. 393 (2010) 34

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(9th Cir. 2000) 4

Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001) 14

Student Public Interest Research Group of New Jersey, Inc. v. AT&T Bell Labs, 842 F.2d 1436 (3d Cir. 1988) 24

Tyler v. Bethlehem Steel Corp., 958 F.2d 1176 (2d Cir. 1992) 23

United States v. Alcan Aluminum Corp., 315 F.3d 179 (2d Cir. 2003) 9

United States v. Bailey, 571 F.3d 791 (8th Cir. 2009) 28

United States v. Carrizales-Toledo, 454 F.3d 1142 (10th Cir. 2006) 8

United States v. Cundiff, 555 F.3d 200 (6th Cir. 2009) 26-27

United States v. Davis, 825 F.3d 1014 (9th Cir. 2016) 7, 28-30

United States v. Dixon, 687 F.3d 356 (7th Cir. 2012) 4

United States v. Donovan, 661 F.3d 174 (3d Cir. 2011) 4, 28

United States v. Duron-Caldera, 737 F.3d 988 (5th Cir. 2013) 33

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United States v. Gerke Excavating, Inc., 464 F.3d 723 (7th Cir. 2006) 11, 17-18

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United States v. Johnson, 467 F.3d 56 (1st Cir. 2006) ..... *passim*

United States v. Martino, 664 F.2d 860 (2d Cir. 1981) 4

United States v. Riverside Bayview Homes Inc., 474 U.S. 121 (1985) 30

United States v. Robertson, 875 F.3d 1281 (9th Cir. 2017) 7, 31

United States v. Robison, 505 F.3d 1208 (11th Cir. 2007) 25

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INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.3, Chantell and Michael Sackett and Duarte Nursery, Inc., submit this brief amicus curiae in support of Petitioner Erik Hughes.[1] Amici's interest in this case is in the first question presented, which may affect how fractured decisions other than *Freeman*, such as *Rapanos v. United States*, 547 U.S. 715 (2006), are applied by the lower courts.

Amici Chantell and Michael Sackett are the plaintiffs in *Sackett v. EPA*, presently pending, on remand from this Court, in the U.S. District Court for the District of Idaho, Case No. 2:08-cv-00185-N-EJL. The Sacketts are challenging an administrative compliance order issued by the Environmental Protection Agency, which directs them to restore a homesite they own near Priest Lake, Idaho, on the ground that their property contains navigable waters for which no dredge and fill permit will be issued under the Clean Water Act. *See generally, Sackett v. EPA*, 566 U.S. 120, 122 (2012). The sole issue in the Sacketts' challenge to the compliance order is whether their property contains federally protected navigable waters. A key basis on which the EPA defends its jurisdictional determination is that a putative wetland on the property meets the definition found in Justice Kennedy's concurring opinion in *Rapanos*. If Justice Kennedy's lone opinion is not the holding of

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[1] All parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part and no person or entity made a monetary contribution specifically for the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

Rapanos under a proper application of *Marks*, then a significant legal ground for the EPA's enforcement order against the Sacketts would be removed.

Amicus Duarte Nursery, Inc., is a farming company in California, with an ongoing interest in the scope of the federal government's exercise of regulatory authority over farming practices under the Clean Water Act. Duarte Nursery is a petitioner in *Washington Cattlemen's Association v. EPA*, pending in the Sixth Circuit, Case No. 15-4188, which challenges EPA's 2015 regulation defining "waters of the United States" under the Clean Water Act, on the ground that, *inter alia*, the regulation exceeds the statute as interpreted by this Court in *Rapanos*. *See generally In re: EPA*, 803 F.3d 804 (6th Cir. 2015). Duarte Nursery, Inc., is also a respondent before this Court in *National Association of Manufacturers v. Department of Defense*, Case No. 16-299.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the Court with an opportunity to clarify the "narrowest grounds" test used to interpret fragmented decisions of this Court, as set out by *Marks v. United States*, 430 U.S. 188, 193 (1977).

In 2013, the United States charged Hughes federal drug and firearm offenses. Hughes thereafter entered, pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C), into a plea agreement, which the district court accepted. Subsequently, the federal sentencing guidelines commission lowered the recommended sentence for Hughes's charged crimes.

Hughes thereupon asked for a sentence reduction, relying on a provision of the federal criminal code, 18 U.S.C. § 3582(c)(2), that allows a retroactive reduction in a sentence if it was "based on" the sentencing guidelines that were later changed. The central question in Hughes's case is whether a sentence based on a plea agreement also can be considered "based on" the sentencing guidelines such that Hughes may be entitled to retroactive relief.

This Court attempted to answer that question in *Freeman v. United States*, 564 U.S. 522 (2011), a plurality decision in which the Court held that the petitioner was entitled to a sentence reduction, but no opinion of the Court commanded a majority of the justices. A four-Justice plurality argued that a Rule 11(c)(1)(C) agreement generally is subject to retroactive sentencing relief, if the judge's decision to accept the agreement was based on the sentencing guidelines. Justice Sotomayor concurred in the judgment only. In her view, the availability of retroactive relief depends not on what the judge thought or said, but rather on what the Rule 11(c)(1)(C) agreement expressly contemplates. The lower courts, however, are irreconcilably split on how to interpret *Freeman*, because they disagree on how to interpret split decisions.

The difficulty that lower courts have experienced interpreting *Freeman* is reflective of widespread confusion among the lower courts regarding the *Marks* test. Much of that confusion stems from the fact that, in the four decades since *Marks*, this Court has not clarified the criteria for determining the "narrowest grounds," or whether such an opinion

exists.[2] Thus, many lower courts interpret *Marks* as directing them to search for a single "narrowest" opinion—even where the putatively "narrowest" opinion reflects the reasoning of only one of the Court's nine members.[3] Other courts find it inappropriate to give binding effect to portions of an opinion in which a majority of Justices did not explicitly or implicitly acquiesce.[4] Still other courts consider the rationale of dissenting opinions when striving to find the "narrowest grounds."[5] Given this,

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[2] *See, e.g.*, *United States v. Martino*, 664 F.2d 860, 872 (2d Cir. 1981) (observing that the Supreme Court has not "elaborated on what was meant by 'narrowest grounds'"); *cf. Lisk v. Lumber One Wood Preserving, LLC*, 792 F.3d 1331, 1337 (11th Cir. 2015) ("For some issues, asking which of two opinions is narrower is akin to asking, 'Which is taller, left or right?'").

[3] *See, e.g.*, *United States v. Dixon*, 687 F.3d 356, 359 (7th Cir. 2012) (holding that "[e]ven though eight Justices disagreed with Justice Sotomayor's approach [in *Freeman v. United States*, 564 U.S. 522 (2011),] and believed it would produce arbitrary and unworkable results, her reasoning" was nonetheless controlling under *Marks* (citation omitted)); *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188, 1198, 1200 (9th Cir. 2000) (concluding that Justice Powell's opinion controlled in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), even though "none of the other Justices fully agreed with Justice Powell's opinion").

[4] *See, e.g.*, *United States v. Epps*, 707 F.3d 337, 348 (D.C. Cir. 2013) (concluding that the "narrowest opinion" under *Marks* "must represent a common denominator of the Court's reasoning" and "must embody a position implicitly approved by at least five Justices who support the judgment" (emphasis omitted) (quoting *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc)).

[5] *Compare, e.g.*, *United States v. Donovan*, 661 F.3d 174, 182–83 (3d Cir. 2011) (interpreting *Marks* and subsequent Supreme Court opinions to require that lower courts "examine the dissenting Justices' views to see if there is common ground" among a majority as to a rationale), *with, e.g.*, *King*, 950 F.2d at

it is unsurprising to find a series of long-standing circuit splits on important legal issues resulting from disagreements regarding the "narrowest grounds" rule.[6]

Amici curiae urge this Court to clarify the *Marks* rule. In particular, Amici urge this Court to emphasize that lower courts may not use dissenting opinions in determining the narrowest grounds for judgment; lower courts may not use multiple opinions supporting the judgment if neither satisfies the *Marks* "narrowest grounds" test; lower courts should be particularly cautious about determining single Justice opinions to be the holding of a fractured decision; and lower courts should determine the "narrowest grounds" for a decision without regard to which opinion most narrowly constrains government power and with careful attention to the issue actually decided by the judgment in the case.

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783 ("[W]e do not think we are free to combine a dissent with a concurrence to form a *Marks* majority.").

[6] *See, e.g.*, *Garland v. Roy*, 615 F.3d 391, 402–03 (5th Cir. 2010) (identifying a four-way circuit split regarding application of *Marks* to *United States v. Santos*, 553 U.S. 507 (2008), and rejecting all four in favor of a fifth distinct approach); Berkolow, *Much Ado About Pluralities: Pride and Precedent Amidst the Cacophony of Concurrences, and Re-Percolation After* Rapanos, 15 Va. J. Soc. Pol'y & L. 299, 334–44 (2008) (describing a circuit split regarding the proper application of *Marks* to the opinions in *Rapanos v. United States*, 547 U.S. 715 (2006)); B. Andrew Bednark, Note, *Preferential Treatment: The Varying Constitutionality of Private Scholarship Preferences at Public Universities*, 85 Minn. L. Rev. 1391, 1398-99 (2001) (identifying a three-court split as to the controlling opinion in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978)).

ARGUMENT

I

THE CIRCUIT COURTS HAVE MISSED THE MARK WITH *MARKS*

This Court articulated the rule for determining the controlling rule of law when no single opinion commands a majority of the members of the Court in *Marks v. United States*, 430 U.S. 188 (1977). There, the Court instructed that the controlling opinion is that which supports the judgment on the "narrowest grounds."[7] *Id.* at 193. As simple as that rule sounds, history has shown it to be difficult to apply, resulting in numerous splits of authority among the lower courts when interpreting fragmented decisions.[8]

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[7] This rule for interpreting fractured opinions derived from the Supreme Court's decision in *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976). In *Gregg*, the Court examined *Furman v. Georgia*, 408 U.S. 238 (1972), which involved a challenge to the constitutionality of a Georgia death penalty statute. In *Furman*, five Justices had agreed in the judgments, but the Court split on the legal standard that should be applied to death penalty cases: two concurring Justices felt that capital punishment was unconstitutional in all cases, whereas the other three Justices believed that capital punishment was unconstitutional only in the circumstances presented by the case. Concluding that the plurality opinion controls, *Gregg* explained that "Since five Justices wrote separately in support of the judgments in *Furman*, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . ." *Gregg*, 428 U.S. at 169 n.15.

[8] Despite this difficultly, the "narrowest ground" test is the only rule sanctioned by this Court for interpreting its split decisions. *See Gregg v. Georgia*, 428 U.S. at 169 n.15; *Furman v. Georgia*, 408 U.S. 238 (1972); *see also In re Cook*, 322 B.R. 336, 341 (Bkrtcy. N.D. Ohio 2005) ("The only approach approved by the Supreme Court is the 'narrowest grounds' approach.").

United States v. Robertson, 875 F.3d 1281, 1290 (9th Cir. 2017) ("[r]ecognizing the difficulty that courts have faced in discerning what the Supreme Court meant by 'narrowest grounds'"); *United States v. Davis*, 825 F.3d 1014, 1020 (9th Cir. 2016)("In the nearly forty years since *Marks*, lower courts have struggled to divine what the Supreme Court meant by 'the narrowest grounds.'"); *see also Nichols v. United States*, 511 U.S. 738, 746 (1994) (*Marks* has "baffled and divided the lower courts that have considered it."); *see also* Note, *Plurality Decisions and Judicial Decisionmaking*, 94 Harv. L. Rev. 1127, 1130 (1981) (stating that some plurality decisions are "incomprehensible" to lower courts).

Much of that confusion, however, arises from the lower courts' failure to faithfully follow *Marks*. In *Marks*, this Court was asked to determine the standard applicable to regulations restricting obscene material. 430 U.S. at 188–90. To answer that question, the Court turned to its fractured decision in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen. of Mass.*, 383 U.S. 413, 419, 421 (1966). There, three Justices in the plurality decided a book was protected from government regulation if it was otherwise "obscene" but had some social redeeming value. *Id.* at 419, 443. Two other Justices concurred in the judgment, relying on what the Court called "broader grounds" that the First Amendment provided an absolute shield against government action to suppress obscenity. *Id.* at 421, 424. A sixth Justice concurred in the judgment based on his view that only hardcore pornography may be suppressed. *Id.* at 421. *Marks* concluded that the three-Justice plurality was the "narrowest grounds"

for the judgment and the controlling opinion in the case.[9] 430 U.S. at 193-94.

Despite the seeming simplicity of this rule, the precise manner in which a court is to determine which opinion rests on the "narrowest grounds," however, is subject to widespread confusion.[10] *Marks* states that for an opinion to constitute the "narrowest grounds," it must be a logical subset of the other opinions

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[9] Importantly, *Marks* rejected the common argument that plurality decisions, by their very nature, have no precedential effect. *See, e.g., Wiesenfeld v. Sec'y of Health, Educ. & Welfare*, 367 F. Supp. 981, 988 (D.N.J. 1973); Mark Alan Thurmon, Note, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 Duke L.J. 419, 420 (1992). Some state courts still adhere to this view regarding the precedential significance of their own plurality decisions. *See, e.g., Rowland v. Washtenaw Cty. Rd. Comm'n*, 731 N.W.2d 41, 47 n.7 (Mich. 2007) ("[D]ecisions in which no majority of the justices participating agree with regard to the reasoning are not an authoritative interpretation under the doctrine of stare decisis.").

[10] *Compare, e.g., Green v. Haskell Cty. Bd. of Comm'rs*, 568 F.3d 784, 807 n.17 (10th Cir. 2009) ("Given that [*Van Orden v. Perry*, 545 U.S. 677 (2005),] was decided by a plurality, the separate opinion of Justice Breyer, who supplied the 'decisive fifth vote,' is controlling under the rule of *Marks*." (citations omitted) (quoting *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1198 (10th Cir. 2003))), *with, e.g., United States v. Carrizales-Toledo*, 454 F.3d 1142, 1151 (10th Cir. 2006) ("In practice, . . . the *Marks* rule produces a determinate holding 'only when one opinion is a logical subset of other, broader opinions.'" (quoting *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc))). Some circuit courts have even commented on this internal inconsistency. *See, e.g., Lisk v. Lumber One Wood Preserving, LLC*, 792 F.3d 1331, 1337 (11th Cir. 2015) ("[W]e apparently have taken as many as three different approaches [to the narrowest grounds rule]—or we at least have articulated our approach three different ways—when confronting other fragmented Supreme Court decisions.").

supporting the judgment: "In essence, the narrowest opinion must represent a common denominator of the Court's reasoning; it must embody a position implicitly approved by at least five Justices who support the judgment." *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc) (holding *Marks* works only when "one opinion is a logical subset of . . . broader opinions"); *see also, e.g., United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2d Cir. 2003); Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 Cal. L. Rev. 1, 45–48 (1993) (arguing *Marks* doctrine only works when concurring rationales "fit [] within each other like Russian dolls"). Put another way:

> The Justices supporting the broader legal rule must necessarily recognize the validity of the narrower legal rule. That is, if a statute is found to be constitutionally permissible pursuant to a strict scrutiny standard of review, then it is necessarily permissible pursuant to a rational basis standard of review. From the text of the alternative concurring opinions, it is possible to determine that if all of the Justices apply the narrower rule, the outcome would have been the same.

Ken Kimura, *A Legitimacy Model for the Interpretation of Plurality Decisions*, 77 Cornell L. Rev. 1593, 1603–04 (1992) (footnote omitted). So viewed, the *Marks* rule supports the principle of majoritarianism by ascertaining, where possible, the narrow legal proposition that is supported by a majority and that is consistent with the disposition of

the case. *See King*, 950 F.2d at 781 ("[T]he narrowest opinion must . . . embody a position implicitly approved by at least five Justices who support the judgment.").

This interpretation of *Marks* is consistent with the cases cited therein. Consider, for example, the three judgment-supportive opinions in *Memoirs*. The broadest rationale supporting the judgment in that case was the opinion of Justices Black and Douglas, which would categorically ban obscenity prosecutions. Justice Stewart's sole concurrence provided a narrower rule, concluding that only "hardcore pornography" should be subject to prosecution. Finally, Justice Brennan's plurality opinion provided the narrowest subset by proposing a three-part test to determine the circumstances when obscenity can be subject to prosecution. Each of those opinions aligns in a manner that reflects consensus among the six concurring Justices regarding the proper application of their respective rationales. Thus, any obscenity prosecution deemed impermissible under Justice Brennan's plurality opinion would necessarily be considered impermissible under the more speech-protective rationales endorsed by Justices Stewart, Black, and Douglas. Without such alignment between the judgment-supportive opinions, courts risk elevating the viewpoint of a minority of the Court into a rule of law.

Marks addressed this risk by recognizing that there will be times when the "narrowest grounds" test does not work—*i.e.*, when no opinion is a logical subset of any other. In that circumstance, there is no rule of law to be found in the decision, and only the judgment controls.

> When, however, one opinion supporting the judgment does not fit entirely within a broader circle drawn by the others, *Marks* is problematic. If applied in situations where the various opinions supporting the judgment are mutually exclusive, *Marks* will turn a single opinion that lacks majority support into national law. When eight of nine Justices do not subscribe to a given approach to a legal question, it surely cannot be proper to endow that approach with controlling force, no matter how persuasive it may be.

King, 950 F.2d at 782.

A rule that forced lower courts to glean a precedential rule of law in such a circumstance would undermine the judicial process by transferring the power to establish precedent away from the majority and toward individual Justices, presumably on the theory that his or her concurring opinion reflects the position that a majority of the Court would most likely have reached on had they been "forced to choose" a single rationale. *See, e.g., United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724 (7th Cir. 2006) (interpreting *Marks* to require "lower-court judges . . . to follow the narrowest ground to which a majority of the Justices would have assented if forced to choose"). Plurality decisions, however, are only made possible because the Justices are not forced to choose in this way and have instead chosen not to adopt a single opinion as the authoritative position of the Court.[11]

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[11] *See, e.g., Rapanos v. United States*, 547 U.S. at 810 (Stevens, J., dissenting) ("It has been our practice in a case coming to us from a lower federal court to enter a judgment commanding that court to conduct any further proceedings pursuant to a specific

Thus, while a majority may opt to join in a single rationale, that fact alone does not justify the suggestion that lower courts must act as if the majority actually did so.

Importantly, both *Marks* and *Gregg* instructed lower courts to identify the "holding of the Court" by looking to the "position taken by those [Justices] who concurred in the judgments on the narrowest grounds." *Marks*, 430 U.S. at 193 (quoting *Gregg v. Georgia*, 428 U.S. at 169 n.15). The opinion of dissenting Justices cannot constitute part of the logical set supporting the judgment and cannot be combined with a concurring opinion in order to formulate a precedential rule of law. *See City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 764 n.9 (1988) (criticizing the dissenting opinion's reliance on a dissenting opinion as inconsistent with *Marks*); *see also* Jonathan H. Adler, *Reckoning with* Rapanos*: Revisiting "Waters of the United States" and the Limits of Federal Wetland Regulation*, 14 Mo. Envtl. L. & Pol'y Rev. 1, 14 (2006) ("Nothing in the dissent constitutes a portion of the judgment of the Court, so nothing in the dissent" can be "part of the actual holding of the case" under *Marks*.); A.M. Honore, Note, *Ratio Decidendi: Judge and Court*, 71 Law Q. Rev. 196, 198 (1955) ("[O]pinions of [dissenting] judges cannot form part of the *ratio decidendi* of a case [because] they are not reasons for the order made by the court . . . .").

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mandate. That prior practice has, on occasion, made it necessary for Justices to join a judgment that did not conform to their own views.").

The below discussion of the lower courts' inconsistent application of *Marks* to the plurality decision in *Rapanos* illustrates this deeply entrenched confusion over the "narrowest grounds" and what portions of a fractured decision may be considered. Only clarification by this Court will bring an end to the widening disagreement among the lower courts.

II

RAPANOS ILLUSTRATES HOW WIDE OF *MARKS* THE CIRCUIT COURTS ARE

In *Rapanos*, the Supreme Court sought to define the scope of the Clean Water Act (CWA),[12] which prohibits the discharge of pollutants, including dredged and fill material, into "navigable waters" without a federal permit[13] and defines the term "navigable waters" as "waters of the United States."[14] *Id.* at 730–32. The Army Corps of Engineers claimed the CWA covered the shallow wetlands on John Rapanos's Michigan lots. *Id.* at 729-30. When he graded the lots for construction, Corps officials cited Mr. Rapanos for filling "navigable waters" without a permit in violation of the Act. *Id.* The district court found Mr. Rapanos liable because the wetlands on his property bordered a manmade drainage ditch that flowed intermittently through a series of conduits to a navigable-in-fact watercourse miles away.[15] The Sixth Circuit Court of Appeals upheld the district court on the theory that any hydrological connection with a

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[12] Clean Water Act, 33 U.S.C. §§ 1251–1275 (2012).
[13] 33 U.S.C. § 1344(a) (2012).
[14] 33 U.S.C. § 1362(7) (2012).
[15] *See United States v. Rapanos*, 190 F. Supp. 2d 1011, 1013 (E.D. Mich. 2002).

traditional navigable water was sufficient for federal jurisdiction, no matter how slight.[16] In a fractured decision, this Court reversed the Sixth Circuit, however, invalidating the Army Corps regulation's expansive interpretation of the CWA. *Id.* at 757; *see National Association of Manufacturers v. Department of Defense*, No. 16-299 (Jan. 22, 2018), slip op. at 4 (Court struck down overbroad regulations in *Rapanos*).

Five of the nine Justices agreed the Corps' regulations exceeded the scope of the Act and that the agency could not regulate all waters based solely on a hydrological connection to a downstream navigable-in-fact waterway. Chief Justice Roberts observed:

> Rather than refining its view of its authority in light of our decision in *SWANCC*,[17] and providing guidance meriting deference under our generous standards, the Corps chose to adhere to its essentially boundless view of the scope of its power. The upshot today is another defeat for the agency.

Rapanos, 547 U.S. at 758.

Writing for a four-member plurality, Justice Scalia agreed:

> In applying the definition to "ephemeral streams," "wet meadows," storm sewers and culverts, "directional sheet flow during storm events," drain tiles, man-made drainage ditches, and dry arroyos in the middle of the

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[16] *See United States v. Rapanos*, 376 F.3d 629, 642 (6th Cir. 2004). *See id.* at 639.

[17] *See Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 168 (2001) ("*SWANCC*").

> desert, the Corps has stretched the term "waters of the United States" beyond parody. The plain language of the statute simply does not authorize this "Land Is Waters" approach to federal jurisdiction.

Id. at 734.

Justices Scalia, Thomas, Alito, and Roberts determined the language, structure, and purpose of the CWA limited federal authority to "relatively permanent, standing or continuously flowing bodies of water" commonly recognized as "streams, oceans, rivers and lakes" connected to traditional navigable waters. *Id.* at 716, 739. The Scalia plurality would also authorize federal regulation of wetlands physically abutting these water bodies, but only if they have a continuous surface water connection whereby the wetland and water body are literally "indistinguishable." *Id.* at 755.

Although Justice Kennedy joined the plurality in finding the agency regulations beyond the scope of the Act, providing a five-member majority in favor of Mr. Rapanos, he proposed a different standard for determining "waters of the United States" subject to federal control under the Act. Under a "significant nexus"[18] test, the federal government could regulate a wetland if it significantly affects a navigable-in-fact waterway. *Id.* at 780. This excludes from federal regulation remote drains, ditches, and streams with insubstantial flows and only speculative evidence of a "significant nexus." *Id.* at 779-81.

The four Justices in the dissent (Stevens, Souter, Ginsburg, and Breyer) would have granted *Chevron*

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[18] *Id.* at 759 (Kennedy, J., concurring).

deference to uphold the Corps' regulations, and took the view that the Act allowed the Corps to regulate any feature that advanced the statutory goal of maintaining the "chemical, physical, and biological integrity of the Nation's waters." *Id.* at 787. (Stevens, J., dissenting).

Although *Rapanos* provided a clear majority that the Corps' regulatory definition of "waters of the United States" are invalid, the five prevailing Justices split four to one on their rationale. *Id.* at 718. Consequently, the lower courts must decide the controlling opinion, if there is one, to determine whether *Rapanos* stands for more than the invalidity of the Corps' regulations. In putative reliance on *Marks*, many circuit courts have either adopted the lone Kennedy concurrence, or rejected *Marks* as unworkable. Other courts have adopted an either/or test allowing the government to establish federal jurisdiction under either the Kennedy concurrence or the Scalia plurality. Still others have adopted the Kennedy concurrence as a subset of the dissenting opinion's rationale.

The following cases demonstrate the depth of conflict in the lower court's application of *Marks*.

Northern California River Watch v. City of Healdsburg

The Ninth Circuit was the first Circuit Court to apply *Marks* to *Rapanos*. In *Northern California River Watch v. Healdsburg (River Watch I)*, the court summarily concluded the Kennedy concurrence was controlling without further discussion:

> Justice Kennedy, constituting the fifth vote for reversal, concurred only in the judgment

> and, therefore, provides the controlling rule of law. *See Marks v. United States*, 430 U.S. 188 (1977) (citation omitted), (explaining that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds").

457 F.3d 1023, 1029 (9th Cir. 2006). This summary disposition adds nothing to an understanding of the *Marks* analysis. It is unclear why the Ninth Circuit concluded the Kennedy concurrence is controlling, and this conclusion has been drawn into question by the more recent Ninth Circuit decision in *United States v. Davis*, discussed later.

The Ninth Circuit decision on panel rehearing in *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993, 1000 (9th Cir. 2007) (*River Watch II*), affirms its decision in *River Watch I* that the Kennedy test is controlling, because it is the least restrictive of federal authority.[19] *River Watch II* was issued on panel rehearing from *River Watch I*, following the issuance of the Seventh Circuit's decision in *United States v. Gerke*, discussed next.

United States v. Gerke

United States v. Gerke Excavating, Inc. was the next appellate case to apply *Marks* to the *Rapanos* decision. 464 F.3d 723, 724 (7th Cir. 2006). Gerke was charged with filling "waters of the United States"

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[19] *But see N. Cal. River Watch v. Wilcox*, 633 F.3d 766, 781 (9th Cir. 2010) (*Healdsburg* did not foreclose establishing jurisdiction under the plurality decision as well as the Kennedy concurrence).

without a federal permit under the CWA. *Id.* at 723. Gerke challenged the government's jurisdiction in the case and petitioned the Supreme Court after losing in the Seventh Circuit. *Id.* at 723–24. This Court granted certiorari and remanded the case in light of *Rapanos*. *Id.* at 724. On remand, the Seventh Circuit held in a per curiam decision that Justice Kennedy's concurring opinion was controlling because: (1) that opinion was the least restrictive of government authority; and (2) when joined with the four dissenters, Justice Kennedy's opinion made up a majority on the Court. *Id.* at 724–25.

To reach that conclusion, however, the Seventh Circuit misstated the *Marks* test. According to *Gerke*:

> When a majority of the Supreme Court agrees only on the outcome of a case and not on the ground for that outcome, lower court-judges are to follow the narrowest grounds to which a majority of the Justices would have assented if forced to choose.

Id. at 724; *but see Marks*, 430 U.S. at 193 (The holding of a plurality opinion "may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."). This misstatement of *Marks* allowed the Seventh Circuit to aggregate the Kennedy concurrence with the four dissenting Justices to reach a majority. But *Marks* does not allow consideration of the dissenting opinions in a fractured decision like *Rapanos*.

Later, in *Gibson v. American Cyanamid. Co.*, the Seventh Circuit revisited its *Gerke* decision, holding it had been wrong to count the *Rapanos* dissent in ruling on the controlling opinion. 760 F.3d 600, 621 (7th Cir.

2014) ("Of course, *Marks* itself is binding on us, and instructs that only those positions of the Justices concurring in the outcome count in the analysis."). *Gibson* explained that it makes sense to exclude dissenting opinions because "by definition, the dissenters have disagreed with both the plurality and any concurring Justice" as to the outcome as well as how the governing standard should apply. *Id.* at 620. It is very likely, the court said, that if the dissenters disagree (and are cited) then the lower courts and litigants "will not have a clear idea on the contours of the standard and how to apply it in future cases." *Id.* "This is not the way to make binding precedent." *Id.*

Accordingly, in *Gibson* the Seventh Circuit concluded that its reliance on the *Rapanos* dissent in *Gerke* was dicta and not necessary to the decision. *Gibson*, 760 F.3d at 621. Nevertheless, *Gibson* affirmed *Gerke*'s conclusion that Justice Kennedy's concurrence in *Rapanos* was the "narrowest grounds" and therefore controlling. *Id.*

Gerke cited no authority for the proposition that "narrowest grounds" means least restrictive of government authority. Nor could that standard apply universally because not all split decisions involve the government. If *Gerke* had been true to *Marks* and discounted the dissent, it could have found a majority by looking to the *Rapanos* plurality as the "narrowest grounds."[20] Whenever the plurality would find a

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[20] In *Rapanos*, the plurality thought Justice Kennedy's "significant nexus" approach was not much narrower than the outsized reading the Corps (and the dissent) gave the Act. "Justice Kennedy tips a wink at the agency, inviting it to try its same expansive reading again." 547 U.S. at 756 n.15. And, as noted above, the dissent opined that "Justice Kennedy's

jurisdictional water, Justice Kennedy would agree because the plurality test is a logical subset of Justice Kennedy's broader "significant nexus" test. Together, the four Justices in the plurality and Justice Kennedy constitute a five-member majority—without distorting *Marks*. *See* M. Reed Hopper, *Running Down the Controlling Opinion in* Rapanos v. United States (March 10, 2017). University of Denver Water Law Review, Forthcoming. Available at SSRN: https://ssrn.com/abstract=2983915.

United States v. Johnson

In *United States v. Johnson*, the government cited landowners under the CWA for converting wetlands to cranberry bogs without a federal permit. 467 F.3d 56, 58 (1st Cir. 2006). In defense, the landowners challenged the government's statutory jurisdiction. *Id.* A split panel of the First Circuit Court of Appeals upheld federal jurisdiction citing a "hydrological connection" to navigable waters. *Id.* Shortly thereafter, this Court invalidated that basis for jurisdiction in *Rapanos*. On remand, the First Circuit rejected *Gerke*'s interpretation of *Marks* and declared that the trial court could establish federal jurisdiction under either the Scalia plurality test or the Kennedy "significant nexus" test. *Id.* at 66. But this just exacerbated the confusion over how to apply *Marks* to *Rapanos*.

The First Circuit thought it curious that *Gerke* equated "narrowest grounds" with the opinion least restrictive of federal authority. "Such an equation,"

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approach . . . treats more of the Nation's waters as within the Corps' jurisdiction," and it would be a rare case when the plurality test is met and the Kennedy test is not. *Id.* at 754 n.14.

the court stated, "leaves unanswered the question of how one would determine which opinion is controlling in a case where the government is not a party." *Johnson*, 467 F.3d at 63. The court found it "just as plausible to conclude that the narrowest ground of decision in *Rapanos* is the ground most restrictive of government authority (the position of the plurality)," because, the court concluded, "that ground avoids the constitutional issue of how far Congress can go in asserting jurisdiction under the Commerce Clause." *Id.*

In contrast to the Seventh Circuit's reading of *Marks* in *Gerke*, the First Circuit suggested the "narrowest grounds" might sensibly be interpreted to mean the "less far-reaching-common ground,"[21] or the opinion "most clearly tailored to the specific fact situation before the Court and thus applicable to the fewest cases." *See* Mark Alan Thurmon, Note, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 Duke L.J. 419, 420–21 (1992). Relying on *King v. Palmer*,[22] the First Circuit noted the D.C. Circuit found "*Marks* is workable—one opinion can be meaningfully regarded as 'narrower' than another—only when one opinion is a logical subset of other, broader opinions." *Johnson*, 467 F.3d at 63. "In other words," the First Circuit explained, "the 'narrowest grounds' approach makes the most sense when two opinions reach the same result in a given case, but one opinion reaches that result for less sweeping reasons than the other."

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[21] *Johnson*, 467 F.3d at 63 (quoting *Johnson v. Bd. of Regents of Univ. of Ga.*, 263 F.3d 1234, 1247 (11th Cir. 2001)).
[22] 950 F.2d at 781.

Id. at 64. According to the First Circuit, *Marks* followed this approach.

For examples, the court cited *Furman*[23] and *Memoirs*[24] upon which *Marks* was based. In *Furman*, the First Circuit observed, "the Justices who concluded that capital punishment was per se unconstitutional would always strike down future death penalty sentences," but the Justices who found the death penalty unconstitutional only as administered in *Furman* "would only strike down capital sentences in a subset of future capital cases." *Johnson*, 467 F.3d at 64. Likewise, in *Memoirs*, "two Justices would always require a ruling in favor of protecting speech, but the view of three other Justices that only non-obscene speech is protected would extend First Amendment protection only to a subset of such cases." *Id.* The First Circuit therefore concluded the "less sweeping opinion in each case [i.e., the opinions that are the logical subset of the other per se opinions] represents the 'narrowest grounds' for the decision." *Id.*

Having concluded that *Marks* applies only where one opinion is the subset of another concurring opinion, the First Circuit then held the understanding of "narrowest grounds" does not translate easily to *Rapanos*: "The cases in which Justice Kennedy would limit federal jurisdiction are not a subset of the cases in which the plurality would limit jurisdiction." *Id.* For this reason, the court rejected *Gerke*'s conclusion that, under *Marks*, Justice Kennedy's lone concurrence is controlling in *Rapanos*. Instead, the First Circuit held the "federal government can

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[23] *See generally Furman*, 408 U.S. 238.

[24] *See generally Memoirs*, 383 U.S. 413.

establish jurisdiction over the target sites if it can meet either the plurality's or Justice Kennedy's standard as laid out in *Rapanos*." *Id.* at 66.

Notably, the First Circuit cited, with approval, that a number of Circuits have abandoned the *Marks* approach to split opinions or applied *Marks* selectively. *Johnson*, 467 F.3d at 64. Instead, those courts have sought to divine the controlling opinion in this Court's fragmented decisions, like *Rapanos*, by adopting a so-called "pragmatic" approach to the situation. *Id.* This approach involves assessing which grounds would "command a majority of the Court." *Id.* In *Tyler v. Bethlehem Steel Corp.*, for example, the Second Circuit concluded: "In essence, what we must do is find common ground shared by five or more justices." 958 F.2d 1176, 1182 (2d Cir. 1992). Similarly, in *United States v. Williams*, the Ninth Circuit held,

> [w]e need not find a legal opinion which a majority joined, but merely "a legal standard which, when applied, will necessarily produce results with which a majority of the Court from that case would agree."

435 F.3d 1148, 1157 (9th Cir. 2006) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 947 F.2d 682, 693 (3d Cir. 1991)).

The First Circuit in *Johnson* used similar logic to justify its determination that federal jurisdiction over wetlands could be established under either the plurality test in *Rapanos* or the Kennedy test: "If Justice Kennedy's test is satisfied, then at least Justice Kennedy plus the four dissenters would support jurisdiction. If the plurality's test is satisfied,

then at least the four plurality members plus the four dissenters would support jurisdiction." *Johnson*, 467 F.3d at 64.

The First Circuit also relied on *Student Public Interest Research Group of New Jersey, Inc. v. AT&T Bell Labs*,[25] wherein the Third Circuit examined *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*[26] to determine the controlling opinion. In *Pennsylvania*, the Supreme Court was asked to address the availability of contingency fees under federal fee-shifting statutes. 483 U.S. at 714. The court split along the lines of *Rapanos* with four Justices in the plurality, four Justices in the dissent, and Justice O'Connor's lone concurrence in the judgments. *Id.* at 731. The Third Circuit thus determined that "[b]ecause the four dissenters would allow contingency multipliers in all cases in which Justice O'Connor would allow them, her position commands a majority of the Court" and is controlling. *Student Pub.*, 842 F.2d at 1451.

In *King v. Palmer*,[27] however, the D.C. Circuit took a different approach. The D.C. Circuit refused to examine the points of commonality among Justice O'Connor's opinion and that of the dissent, relying mainly on a literal reading of *Marks* that the holding is the position of the Justices "who concurred in the judgments on the narrowest grounds." 950 F.2d at 783. The D.C. Circuit also relied on the fact that this Court had not explicitly applied *Marks* in a way that would combine concurring and dissenting votes. *Id.*

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[25] 842 F.2d 1436, 1438–39 (3d Cir. 1988).
[26] 483 U.S. 711 (1987).
[27] 950 F.2d 771 (D.C. Cir. 1991).

United States v. Robison

In *United States v. Robison*, a pipe manufacturer was convicted for discharging wastewater into a nearby waterway in violation of its Clean Water Act discharge permit. 505 F.3d 1208, 1211 (11th Cir. 2007). On appeal, the defendants argued the jury should have been instructed that the government must establish jurisdiction based solely on the *Rapanos* plurality and not on the Kennedy concurrence. *Id.* at 1219. The Eleventh Circuit rejected *Johnson*'s either/or approach and adopted the *Gerke* holding that the Kennedy opinion was the "narrowest grounds" and controlling under *Marks*, because it was the least restrictive of federal authority. *Id.* at 1221–22. The court's *Marks* analysis is instructive, albeit flawed.

First, the court observed it would be a rare case in which the plurality test is met and the Kennedy test is not. *See id.* at 1220. And, "as a practical matter" such rare cases can be dismissed. *Id.* This concedes that the plurality test is a subset of the Kennedy test and under *Marks* should control. But the Eleventh Circuit accepted the Seventh Circuit's assertion that the "narrowest grounds" is the opinion least restrictive of federal authority—a proposition that finds no support in this Court's case law. The Eleventh Circuit did not address how that rule would apply when the government is not a party and cited no authority for that interpretation other than *Gerke*'s ipse dixit to the same effect.

Second, the Eleventh Circuit rejected the First Circuit's reliance on the *Rapanos* dissent in *Johnson*.

See Robison, 505 F.3d at 1220–21. After stating that *Marks* applies only to "those Members who concurred in the judgments," the court acknowledged, "[w]e simply cannot avoid the command of *Marks*." *Id.* at 1221. Moreover, the court held that dissenters, by definition, have not joined in the judgment. *Id.* Therefore, "[i]n [the court's] view, *Marks* does not direct lower courts interpreting fractured Supreme Court decisions to consider the positions of those who dissented." *Id.* The court took this one step further, citing the D.C. Circuit in *King v. Palmer*: "We do not think we are free to combine a dissent with a concurrence to form a *Marks* majority." *Id.* (citing *King*, 950 F.2d at 783). "It would be inconsistent with *Marks*," the Eleventh Circuit continued, "to allow the dissenting *Rapanos* Justices to carry the day and impose an 'either/or' test, whereby the CWA jurisdiction would exist when either Justice Scalia's test or Justice Kennedy's test is satisfied." *Id.* The court simply deemed the votes of the dissenters as "of no moment under *Marks*." *Id.*

United States v. Cundiff

United States v. Cundiff involved landowners who were held to be in violation of the CWA for dredging and filling wetlands without a permit. 555 F.3d 200, 204–05 (6th Cir. 2009). The trial court imposed an injunction against the Cundiffs to restore the property and assessed a civil fine. *Id.* at 205. The Cundiffs challenged federal jurisdiction on appeal arguing the plurality decision is controlling because it is the most restrictive of government authority. *Id.* at 209.

The Sixth Circuit rejected the Cundiffs' argument stating "*Marks* does not imply that the 'narrowest' *Rapanos* opinion is whichever one restricts

jurisdiction the most." *Id.* The court also rejected the "least restrictive of government power" approach favored in *Gerke*, *River Watch*, and *Robison*. *Id.* ("[It] makes little sense for the 'narrowest' opinion to be the one that restricts jurisdiction the least . . . ."). Properly read, the Sixth Circuit held, the "'narrowest' opinion refers to the one which relies on the least doctrinally 'far-reaching-common ground' among the Justices in the majority: it is the concurring opinion that offers the least change to the law." *Id.* However, the court did not apply this test to the *Rapanos* decision.

According to the Sixth Circuit, the controlling opinions in *Memoirs* and *Furman* were "less doctrinally sweeping" than the other concurring opinions as adduced by the fact that, in *Memoirs*, the controlling opinion disagreed that obscenity laws per se violate the Constitution, while, in *Furman*, the controlling opinion disagreed that the death penalty was per se unconstitutional. *Cundiff*, 555 F.3d at 209. Because of this, the Sixth Circuit concluded *Memoirs* and *Furman* were an easy fit for *Marks*. *Id.* However, the court asserted *Marks* is problematic if one opinion does not fit within the broader circle drawn by others. *Id.*

Based on this approach, the Sixth Circuit declared *Marks* inapplicable to *Rapanos* because "there is quite little common ground between Justice Kennedy's and the plurality's conception of jurisdiction under the Act, and both flatly reject the other's views." *Id.* at 210. Therefore, the court abandoned *Marks* and adopted the view of the First Circuit in *Johnson* that there is no controlling opinion in *Rapanos* and the government can establish jurisdiction under either the plurality test or the Kennedy test. *Id.*

Other circuits have adopted the reasoning of the First Circuit without adding anything to the *Marks* analysis. The Eighth Circuit in *United States v. Bailey*[28] and the Third Circuit in *United States v. Donovan*[29] both adhere to the conclusion and reasoning in *Johnson* that *Marks* cannot be applied to *Rapanos* because neither opinion is a subset of the other; therefore jurisdiction can be established under the either/or test. *Johnson*, 467 F.3d at 66. And here the matter stood until two very recent decisions of the Ninth Circuit muddied the waters further.

United States v. Davis

The Ninth Circuit's decision in *United States v. Davis*, 825 F.3d 1014 (9th Cir. 2016) (en banc), does not address *Rapanos*, but it provides a refined perspective on *Marks*, which could be applied to *Rapanos*. In *Davis*, the court examined the 4-1-4 decision in *Freeman*. To determine the controlling opinion, the Ninth Circuit started with the statement in *Marks*:

> When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.

Davis, 825 F.3d at 1020.

The court observed that after forty years, the courts are still struggling "to divine what the Supreme Court meant by the 'narrowest grounds.'" *Id.* As a

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[28] *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009).
[29] *United States v. Donovan*, 661 F.3d 174, 181 (3d Cir. 2011).

result, two approaches have emerged. One is the reasoning-based approach whereby the court seeks to determine if there is a common reasoning among the concurring opinions such that one is a logical subset of the other, broader opinion. *Id.* "In essence, the narrowest opinion must represent a common denominator of the Court's reasoning; it must embody a position implicitly approved by at least five Justices who support the judgment." *Id.* The other approach is results-based and defines "narrowest grounds" as "the rule that would necessarily produce results with which a majority of Justices in the controlling case would agree." *Id.* at 1021. Of the two, the Ninth Circuit preferred the reasoning-based approach:

> To foster clarity, we explicitly adopt the reasoning-based approach to applying Marks. This approach is not only consistent with our most recent case law, [] but also makes the most sense. A fractured Supreme Court decision should only bind the federal courts of appeal when a majority of the Justices agree upon a single underlying rationale and one opinion can reasonably be described as a logical subset of the other. When no single rationale commands a majority of the Court, only the specific result is binding on lower federal courts.

Id. at 1021–22 (citation omitted).

But this approach to *Marks* did not help the court define the "narrowest grounds" in *Davis*. To the contrary, the court found the concurring opinions mutually exclusive in most cases; neither the plurality nor the lone concurrence is a subset of the other. *Davis*, 825 F.3d at 1022. Therefore, a standard *Marks*

analysis does not fit. Although *Marks* expressly limits the analysis to concurring opinions, the Ninth Circuit cited examples where some courts, including the Supreme Court, had looked to the dissent to find a majority. *Id.* at 1024–25 (reserving question of whether dissents can be consulted, since *Freeman* dissent did not change result); *see Marks*, 430 U.S. at 193. Yet the *Davis* court determined that even that approach was unavailing in *Freeman* because neither the plurality position nor the lone concurrence is a logical subset of the dissent, or vice versa. *Davis*, 825 F.3d at 1025. The court acknowledged some overlap among the opinions but found no case in which one opinion would always agree with another. *Id.* Accordingly, the court decided *Marks* could not be applied: "[s]imply put, no combination of *Freeman*'s dissenting and concurring opinions yields a binding rule that we must follow." *Id.*

In the absence of a controlling opinion, the Ninth Circuit concluded it could choose the opinion it found most persuasive, limited only by the result in the case that a defendant relying on a plea agreement is not categorically barred from taking advantage of a sentence reduction under the Guidelines. *Id.* In the end, the court found the plurality the most persuasive and applied that opinion to the case. *Id.* at 1028.

Under the *Davis* approach, the court must first determine whether the reasoning of the plurality and the Kennedy opinion is a logical subset of the other. *Id.* at 1016. The plurality in *Rapanos* reasoned that a jurisdictional wetland must have the characteristics of the wetland regulated in *Riverside Bayview*. *Rapanos*, 547 U.S. at 742; *see United States v. Riverside Bayview Homes Inc.*, 474 U.S. 121, 134–35

(1985). That is, it must be "indistinguishable" from the abutting waterway, not merely connected. *Rapanos*, 547 U.S. at 755. Justice Kennedy acknowledged that such a wetland is subject to federal regulation under *Riverside Bayview*. *Id.* at 765–67; *see Riverside Bayview*, 474 U.S. at 134–35. Therefore, the plurality opinion is a logical subset of the Kennedy opinion. But the converse is not true. The plurality rejected Justice Kennedy's "significant nexus" test where the wetland is not "indistinguishable" from the abutting waterway as in *Riverside Bayview*. *Rapanos*, 547 U.S. at 753–56; *see Riverside Bayview*, 474 U.S. at 134–35. The Kennedy test is broader than the plurality test for wetlands such that the Kennedy test encircles the plurality test in all cases. This is different from *Freeman* where the reasoning of the concurring opinions was not the logical subset of another. Therefore, under a straightforward application of *Marks* as applied by *Davis*, the plurality opinion in *Rapanos* is controlling.

But post-*Davis*, the Ninth Circuit made quick work of reaffirming its prior holding in *River Watch II* that the Kennedy concurrence controls.

United States v. Robertson

Following its decision in *Davis*, the Ninth Circuit addressed whether *Davis* had undermined *River Watch II* in *United States v. Robertson*, 875 F.3d 1281 (9th Cir. 2017). Appellant Robertson argued that *Davis* undermined the Ninth Circuit's prior decision in *River Watch II*, which lacked any of the detailed *Marks* analysis called for by *Davis*. *Robertson*, 875 F.3d at 1290. The Ninth Circuit held that *River Watch II* remained the law of the circuit, on the express ground that Justice Kennedy's opinion is a logical

subset of the *Rapanos* dissent. *Id.* at 1292 (citing *Gerke*'s discussion of the *Rapanos* dissent). *Robertson* thus creates an express circuit split with the D.C. Circuit's decision in *King v. Palmer*, discussed above, on whether dissents may form the "larger set" for *Marks* purposes. *See also Robertson*, 875 F.3d at 1289–90 (cataloging wide circuit splits on how to apply *Rapanos*).[30]

III

JUDICIAL POLICY ON PLURALITIES: WORKING TOWARD MAJORITIES

Although plurality decisions from the Court were historically rare, they have grown more frequent since the mid-twentieth century.[31] As many Court watchers have observed, plurality decisions often occur in cases involving especially difficult and highly salient legal issues on which public opinion is sharply divided.[32] Some of the most significant and divisive Supreme

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[30] When this Court granted certiorari in this case, the Ninth Circuit stayed its mandate in *Robertson* and ordered further briefing on the effect of this Court's decision in this case on the disposition of Mr. Robertson's case. *United States v. Robertson*, No. 16-30178, Dkt # 82 (9th Cir. Dec. 21, 2017).

[31] *See* James F. Spriggs II & David R. Stras, *Explaining Plurality Decisions*, 99 Geo. L.J. 515, 519 (2011) (reporting that the Supreme Court issued only 45 plurality decisions between 1801 and 1955 but issued 195 plurality decisions between 1953 and 2006).

[32] *See, e.g.*, Pamela C. Corley, *Uncertain Precedent: Circuit Court Responses to Supreme Court Plurality Opinions*, 37 Am. Pol. Res. 30, 32 (2009) ("[P]lurality decisions are important to study because they tend to occur in highly salient issue areas such as civil liberties and civil rights." (citation omitted)); Spriggs & Stras, *supra* note 31, at 527 ("[P]lurality decisions tend to occur in difficult and highly salient cases . . . .").

Court cases in recent history—involving such issues as abortion,[33] gun control,[34] voting rights,[35] affirmative action,[36] capital punishment,[37] and the scope of congressional authority under the Commerce Clause[38]—have been decided by plurality decision. At the same time, the effects of plurality decisions extend well beyond such high-profile contexts. The proper interpretation of plurality precedent also matters for a variety of less prominent legal issues that nonetheless carry substantial importance to the workaday business of the federal courts, such as

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[33] *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989).

[34] *See McDonald v. City of Chicago*, 561 U.S. 742 (2010) (concerning incorporation of the Second Amendment against state governments).

[35] *See, e.g., Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008) (challenging Indiana's voter identification law).

[36] *See, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (challenging the constitutionality of racial preferences in public contracting); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (challenging racial preferences in higher education).

[37] *See, e.g., Baze v. Rees*, 553 U.S. 35 (2008) (addressing the permissible methods of capital punishment); *Gregg v. Georgia*, 428 U.S. 153 (1976) (reaffirming capital punishment's constitutionality).

[38] *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (challenging Congress's authority to require that certain individuals either acquire health insurance or pay a penalty).

criminal procedure,[39] sentencing,[40] personal jurisdiction,[41] class certification,[42] and federal preemption of state law.[43]

Recognizing that the government, people, and courts rely on stability and predictability in the law, several Justices have expressed concern that the Court's plurality decisions leave lower courts and litigants with insufficient guidance. *See, e.g.*,

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[39] *See, e.g., United States v. Duron-Caldera*, 737 F.3d 988, 994 & n.4 (5th Cir. 2013) (noting the difficulty of applying the narrowest grounds rule to discern the Supreme Court's holding in *Williams v. Illinois*, 567 U.S. 50 (2012), regarding whether particular statements prepared in the course of an investigation were "testimonial" for purposes of the Sixth Amendment's Confrontation Clause); *United States v. James*, 712 F.3d 79, 95-96 (2d Cir. 2013) (noting the same difficulty).

[40] *See, e.g., In re Sealed Case*, 722 F.3d 361, 365 (D.C. Cir. 2013) (noting the divergence of lower court opinion regarding proper interpretation of the federal sentencing guidelines resulting from differing understandings of the Supreme Court's plurality decision in *Freeman v. United States*, 564 U.S. 522 (2011)).

[41] *See, e.g., Ainsworth v. Moffett Eng'g, Ltd.*, 716 F.3d 174, 178 (5th Cir. 2013) (applying *Marks* analysis to the Supreme Court's plurality decision in *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011)); *AFTG-TG, LLC v. Nuvoton Tech. Corp.*, 689 F.3d 1358, 1363 (Fed. Cir. 2012) (per curiam) (engaging in the same inquiry).

[42] *See, e.g., In re Packaged Ice Antitrust Litig.*, 779 F. Supp. 2d 642, 659-60 (E.D. Mich. 2011) (applying *Marks* to determine the holding of the Supreme Court's plurality decision in *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393 (2010)); *McKinney v. Bayer Corp.*, 744 F. Supp. 2d 733, 746–47 (N.D. Ohio 2010) (engaging in the same analysis).

[43] *See, e.g., Kemp v. Medtronic, Inc.*, 231 F.3d 216, 218, 224 & n.1 (6th Cir. 2000) (applying *Marks* to determine the precedential effect of the Supreme Court's plurality decision in *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996)); *In re Medtronic, Inc. Sprint Fidelis Leads Prods. Liab. Litig.*, 592 F. Supp. 2d 1147, 1151 n.4 (D. Minn. 2009) (parsing the same opinion).

William H. Rehnquist, *Remarks on the Process of Judging*, 49 Wash. & Lee L. Rev. 263, 270 (1992) ("There must be an effort to get an opinion for at least a majority of the Court in every case where that is possible, in order that lower court judges and the profession as a whole may know what the law is without having to go through an elaborate head-counting process."); Judge Ruth Bader Ginsburg, *Remarks on Writing Separately, Jurisprudential Lecture at the University of Washington School of Law (May 11, 1989)*, 65 Wash. L. Rev. 133, 148 (1990) (describing the "proliferation" of decisions without a clear majority as "unsettling"); Justice Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint, Leslie H. Arps Lecture at the Association of the Bar of the City of New York (Oct. 17, 1989)*, 47 Wash. & Lee L. Rev. 281, 289 (1990) ("Splintered decisions provide insufficient guidance for lower courts . . . [and] promote disrespect for the Court as a whole . . . ."). And similar reservations regarding the workability of the *Marks* framework itself have found their way into the Court's opinions *E.g.*, *Nichols v. United States*, 511 U.S. 738, 745–46 (1994) (noting difficulties lower courts had encountered in seeking to apply *Marks* to the Court's fractured opinion in *Baldasar v. Illinois*, 446 U.S. 222 (1980), and concluding that "[w]e think it not useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts which have considered it"); accord *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (reaching a similar conclusion regarding lower courts' interpretation of *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978)).

The discussion of *Rapanos* provides a vivid example of the adverse impacts that uncertainty and

unpredictability have on the public. *See* Spriggs & Stras, *supra* note 31, at 529 ("Clear, understandable precedent is necessary to 'reduce [] transaction costs and wasted judicial effort, and encourage[] like cases to be treated alike—the bedrock of equality and fairness.'" (quoting Michael L. Eber, Comment, *When the Dissent Creates the Law: Cross-Cutting Majorities and the Prediction Model of Precedent*, 58 Emory L.J. 207, 233 (2008))).

Inconsistency and unpredictability in the law is harmful to the public interest in that it promotes ad hoc governance. Take, for example, the First Circuit's conclusion in *United States v. Johnson* that the government can establish CWA jurisdiction by satisfying either the Kennedy or the Scalia plurality test. In *Hawkes v. United States*,[44] the Army Corps of Engineers issued a Jurisdictional Determination asserting federal jurisdiction based on the Scalia plurality test.[45] When the landowners challenged the determination in an administrative setting, the Corps changed tactics, asserting for the first time that the wetlands at issue were subject to federal control under the Kennedy "significant nexus" test, which burdened the landowners with unnecessary delay and expense.[46] An interpretation that allows agencies and courts to follow two different legal tests creates uncertainty among the regulated public and legal practitioners. It also allows the government to play legal games with alleged violators of the CWA. This

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[44] *Hawkes Co. v. U.S. Army Corps of Eng'rs*, 963 F. Supp. 2d 868 (D. Minn. 2013).
[45] *Id.* at 871.
[46] *Id.*

Court's clarification of *Marks* is necessary to protect against the risk of arbitrary and ad hoc governance.

IV

THIS COURT'S CLARIFICATION OF *MARKS* WOULD GET THE CIRCUIT COURTS BACK ON TARGET

This Court could substantially reduce the confusion that attends the lower courts' efforts to apply cases like *Freeman* and *Rapanos* by clarifying *Marks*, based on the above discussed shortcomings in how *Marks* is currently applied.

First, this Court should hold that dissenting opinions in its decisions may not be used as the "larger set" in identifying the narrowest grounds under *Marks*. For all the reasons stated above, including the text of the *Marks* decision, only those opinions supporting the judgment of this Court should be canvassed to determine the holding of a fractured decision.

Second, this Court should hold that when applying *Marks*, the result is either that one opinion supporting the judgment is the holding, or that none are. As discussed above, cases like *United States v. Johnson*, which state that both the plurality or the concurrence in *Rapanos* are the holding of the case, fly directly in the face of *Marks'* charge to identify the narrowest ground for the decision. If a four Justice plurality is a narrower decision than a single Justice concurrence, than the plurality is the holding under *Marks*. But logic prevents each from being narrower than the other. If each opinion nested completely within the other, they would not be separate opinions. This Court should admonish lower courts to identify

the narrowest grounds, if possible, which can only yield one opinion, or none, as the holding under *Marks*.

Third, this Court should caution lower courts against adopting single-Justice opinions as the holding of the Court under a *Marks* analysis when that opinion is expressly critiqued by all the other members of the Court. The circuit courts may do this in two contexts. First, the lower court might consider a single opinion to be the narrowest ground supporting the judgment. But a single opinion whose methodology or conclusions are strongly criticized by the plurality is unlikely to be a logical subset of the plurality (particularly where the concurrence is conceptually closely related to the dissent). And opinions criticized by the other eight Justices, but which nonetheless are taken by the lower courts as the holding of a case, stand the institution of a majoritarian Supreme Court on its head.

Alternatively, a lower court might conclude under *Marks* that a decision has no holding, and wish to adopt a single-Justice concurrence as the "most persuasive" opinion. But the notion of the lower appellate courts determining that a single-Justice opinion, which persuaded no other member of this Court, is nonetheless the law of the land because it is the most persuasive, raises the level of irony in the *Marks* exercise to dangerous levels.

Fourth, this Court should instruct lower courts to disregard whether opinions constrain government power more or less when applying *Marks*. As noted above, this question has no bearing on cases in which the government is not a party. It is entirely unclear why the government, of all parties, should benefit

from such a finger on the scales of justice. It is also entirely inconsistent with the federal judiciary's responsibility to protect the individual liberties of this nation's citizens from government overreach. Further, such an approach makes even less sense when one considers that many statutes which this Court construes (such as the Clean Water Act) can be enforced either privately or by the government. Are lower courts to say that for private enforcement of the Clean Water Act, the *Rapanos* plurality is the holding, but that the concurrence is controlling when the government enforces?

Fifth, this Court could guide lower courts in their application of *Marks* by focusing their attention more closely on the specific question being answered in fractured decisions. While this may continue to yield elusive results in constitutional cases, it should prove fruitful in cases of statutory interpretation. In particular, this Court could hold that when one of its fractured decisions involves interpretation of a federal statute, then lower courts are to look to the narrowest interpretation of that statute among the opinions supporting the judgment.

Finally, this Court could instruct lower courts to be more content with "half-a-holding": in some decisions there is a clear level of agreement among a plurality and a concurrence which could prove helpful in many if not all cases. For example, in a statutory interpretation case like *Rapanos*, the lower courts should focus on the fact that both the plurality and the concurrence interpret the phrase "waters of the United States" as part of the statutory text, and conclude that the agency regulations interpreting the same text are too broad and therefor invalid. Five

Justices voting that a particular regulation is invalid (especially where, as in *Rapanos*, the dissent would have upheld the regulation under *Chevron* deference) is a significant result which lower courts can easily apply in particular cases, despite the lack of agreement on why they are invalid.

CONCLUSION

This Court should clarify *Marks* as described above, to improve uniformity in the Circuit Courts where this Court cannot reach a majority, and to raise this Court's incentives for majority decisions.

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Respectfully submitted,

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